

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS LEE SMITH, II,

Defendant-Appellant.

UNPUBLISHED

July 21, 2011

No. 297452

Kent Circuit Court

LC No. 08-006551-FH

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree criminal sexual conduct, MCL 750.520c. We affirm.

First, defendant argues that insufficient evidence supported his conviction. Sufficiency of evidence is reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). “[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Sexual contact with a person under 13 years of age constitutes second-degree criminal sexual conduct. MCL 750.520c. Sexual contact includes the victim intentionally touching the clothing covering the immediate area of the actor’s intimate parts. MCL 750.520a(q). “[P]roof of intentional touching, alone, is insufficient to establish guilt. The statute further requires that the prosecution prove that the intentional touch could “*reasonably be construed* as being for [a] sexual purpose.” *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997) (emphasis in original). “[M]inimal circumstantial evidence will suffice to establish the defendant’s state of mind, which can be inferred from all of the evidence presented.” *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008) (citations omitted). “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993).

When viewed in a light most favorable to the prosecution, sufficient evidence was introduced to prove beyond a reasonable doubt the elements of second-degree criminal sexual conduct. The victim was six years old at the time of the incident. While defendant and the

victim were alone together, the victim placed her hand into defendant's pocket and touched his penis. Defendant told the victim to keep the incident a secret. An expert witness testified that asking a child to keep an incident a secret is consistent with grooming behavior. Grooming behavior is where an assailant prepares a child to accept sexual touch without reporting it. Defendant initially told the police that he did not become sexually aroused during the incident. Later, however, he admitted the touching caused his penis to become semi-erect. Because there was sufficient circumstantial evidence to support defendant's conviction without reference to the victim's statements to other people, it is unnecessary to address defendant's argument that the jury had to have relied on inadmissible hearsay to convict him.

Second, defendant argues that the prosecutor committed misconduct during her closing argument. Defendant did not object at trial to the purported misconduct. Appellate review is for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003) "To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious and (3) the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plain error affects substantial rights if it affects the outcome of the lower court proceeding. *Id.* Plain error requires reversal only if it "resulted in the conviction of an actually innocent defendant or when an error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993). This Court "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Callon*, 256 Mich App at 329-330. Prosecutorial misconduct is reviewed on a case-by-case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996) (citations omitted). Prosecutors are free to argue the evidence and all reasonable inferences from that evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant argues the prosecutor committed misconduct during her closing argument. Without evidentiary support, the prosecutor argued three times that the victim told her teacher about the incident. This was plain error. Defendant has not, however, carried his burden of proving that this affected the outcome of the trial. *Carines*, 460 Mich at 763. And, we note that if defendant had objected, the trial court could have corrected the error. *Callon*, 256 Mich App at 329-330.

Defendant argues several other incidents of purported prosecutorial misconduct. Defendant argues the prosecutor committed misconduct by asserting that children recant if their parents do not believe their accusations. Testimony supported this claim. No plain error occurred. Defendant argues that the prosecutor committed misconduct by arguing that defendant's wife blamed the victim. While she did not say she blamed the victim, it was a reasonable inference from the evidence. Prosecutors can argue reasonable inferences drawn from the evidence. *Bahoda*, 448 Mich at 282. Defendant argued the prosecutor committed misconduct when she misstated that defendant testified. Defendant did not, in fact, testify at trial. The jury did, however, watch a videotape of defendant's interview with the police. While the prosecutor's misstatement had no basis, if defendant had objected at trial, the trial court could have easily corrected this error. The prosecutor's misstatement was not error requiring reversal. *Callon*, 256 Mich App at 329-330.

Finally, defendant argues that the cumulative effect of the prosecutorial errors denied him his due process rights. “The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of them would not merit reversal, but the cumulative effect of the errors must undermine the confidence in reliability of the verdict before a new trial is granted.” *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). The minor error of referring to defendant’s interview testimony along with the improperly based argument that the victim told a teacher about the incident do not combine to undermine the confidence in the verdict. *Id.* Prosecutorial misconduct does not require a new trial.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens